

MEMORANDUM

TO: Members, Clark Fork Basin Water Management Task Force
FROM: Matt McKinney and Gerald Mueller, Project Coordinators
SUBJECT: Summary of the January 5, 2004 Meeting
DATE: February 4, 2004

Participants

The following people participated in the Task Force meeting:

Task Force Members:

Eugene Manley	Granite County
Harvey Hackett	Bitter Root Water Forum
Fred Lurie	Blackfoot Challenge
Holly Franz	PPL Montana
Elan Darrow	Flathead Basin Commission
Jim Dinsmore	Upper Clark Fork River Basin Steering Committee
Jay Stuckey	Lower Clark Fork
Gail Patton	Sanders County
Marc M. Spratt	Flathead Conservation District
Verdell Jackson	Legislature
Steve Fry	Avista Corp
Matt Clifford	Clark Fork Coalition

Staff:

Matt McKinney	Montana Consensus Council (MCC)
Gerald Mueller	MCC
Mike McLane	Montana Department of Natural Resources and Conservation (DNRC)

Meeting Goals:

- ☐ Discuss additional ideas for the orderly development of water (Chapter 8)
- ☐ Discuss hydropower water rights, junior rights and future water development
- ☐ Discuss drought planning flow targets
- ☐ Make option ranking homework assignment
- ☐ Discuss water management plan format and content
- ☐ Plan for state water plan hearings

Ideas for the Orderly Development of Water

Mike McLane led a discussion of three papers he had prepared and previously circulated to the Task Force concerning the orderly development of water. The papers addressed water banking, water leasing, and new water right permit criteria and are included below, respectively, as Appendices 1, 2, and 3.

Water Banking - Water banking is defined in Appendix 1 as a water conservation tool that enables voluntary, temporary transfers of water entitlements between willing water right holders and users based on how much water a user needs and when it is needed without a permanent change in water rights. Mr. McLane described two basic options for water banking now being practiced by several western states. The first is a “bulletin board” on which information about

proposed water transactions can be posted. People wishing to sell water can post their information in the bank and people wishing to buy can check there for willing sellers. In this option, the state collects and disseminates information about potential transactions to willing water buyers and sellers. In the second option, the state plays a more active role by collecting information, shaping and possibly pursuing transactions. Water is effectively “deposited” in the bank, and the state mingles water from the sellers and allocates it to those wishing to purchase water from the bank. The state may impose conditions on the purchase such as ensuring protection of existing water rights and mitigating impacts on third parties.

Water Leasing as an Alternative to Issuing New Water Rights Permits - Rather than issuing new water rights permits to facilitate new water developments, the state would lease water. The leases would be limited to a specific duration. Instead of paying an application fee for a new permit, the water user would pay for a lease. The leasing approach would have two primary benefits over water right permits. First, after a lease expires, the state could reallocate water to reflect changes in public priorities for water use. Second, instead of acquiring a new, junior water right, which Mr. McLane compared to a license to hunt for water, a lease would guarantee the delivery of “wet” water. To issue leases, the state would have to acquire a supply of water which it would manage. While the state also could acquire water by purchasing senior water rights, water conservation, drought planning, and building new water storage, the most likely sources of water for a leasing program in the Clark Fork would be Hungry Horse Reservoir and Lake Koocanusa. Hungry Horse Dam and Reservoir is a federal project operated by the Bureau of Reclamation. The federal statute that created the Bureau subjected it to state water law. The Bureau’s water rights claims for Hungry Horse include a large amount of storage, possibly 1.7 million acre feet, for irrigation that has not been developed. Mr. McLane speculated that this water might be available to the state for marketing through a lease program. Because both Hungry Horse Dam on the South Fork of Flathead River and Libby Dam on the Kootenai River supply water to the Columbia River, it may be possible to facilitate release of water from Hungry Horse that would otherwise not be available by coordinated management of the two dams. Acquiring water for a state leasing program from the unused irrigation water stored in Hungry Horse may not prove easy because the federal government may argue that it has already put the irrigation block to other beneficial uses.

New Water Right Permit Criteria - Mr. McLane reviewed the existing criteria which the state imposes on new water rights permits. He then suggested new criteria and/or requirements addressing ground water and public interest:

- ☐ Extend MCA 85-2-337 which applies only to the upper Clark Fork River basin to the entire basin. Section 85-2-337 provides that an applicant for a ground water permit must submit a report prepared by a professional engineer or hydrologist addressing the hydrologic connection between the source of the ground water and surface water. The DNRC may not issue a permit unless the applicant proves by a preponderance of evidence that the source of the ground water is not a part of or substantially or directly connected to surface water.
- ☐ Eliminate or modify the permit exemption for ground water permits for wells that pump less than 35 gallons per minute.
- ☐ Require a new permit applicant to define:
 - N The benefits to the applicant and the state derived from the new use of water;
 - N The effects on the quantity and quality of water for existing beneficial uses in the source of supply;
 - N The availability and feasibility of using low-quality water or the purpose for which applicant has been made; and

N The probably significant adverse environmental impacts of the proposed use of water.

Task Force Action - The Task Force agreed to include in Chapter 8 the options of replacing new water rights permits with a water leasing program and of adopting the new water rights permit criteria addressing ground water and public interest discussed immediately above. Also, the Task Force agreed to include as a new water rights permit criteria the assessment of cumulative impacts. The Task Force opted not to include a water bank option in the management plan.

Discussion of Hydropower Water Rights, Junior Rights and Future Water Development

Gerald Mueller began the discussion by summarizing the argument made by Representative Jackson at the January Task Force meeting, namely that by examining annual, decade, and forty-five year Clark Fork River flow data, one cannot demonstrate now that the Avista water rights present a problem for the Clark Fork River Basin and especially the Flathead subbasin. In the ensuing discussion, some Task Force members stated that the problem for Avista's water rights is masked by the averaging that Rep. Jackson conducted. They argued that problem is one of timing and that if flows were examined during the irrigation season and especially in low flow years, that Avista's water rights would likely be adversely affected by junior users and by the issuance of new water rights permits in the basin. They also noted that Avista has objected to a water reservation application by the Granite Conservation District for two new water storage dams in the upper Clark Fork, and that Avista is objecting to water rights claims in the adjudication of basin water rights. The Task Force then discussed a state leasing program using the unused block of irrigation storage in Hungry Horse Reservoir as a possible solution for Avista, those water users with rights junior to Avista and for new water development. If the state could manage the release of this block of water, it might be able to mitigate the need for a water rights call by Avista on junior users and provide for new water development via leases.

Task Force Action - The Task Force requested Mike McLane to explore the potential feasibility of a state leasing program based on the unused irrigation storage in Hungry Horse Reservoir and asked Steve Fry to discuss the state leasing program using this Hungry Horse water as the basis of an agreement between Avista and the state regarding water rights in the Clark Fork basin.

Drought Planning Flow Targets

Because of time constraints, this item was postponed until the next Task Force meeting in March. Mike McLane was asked to prepare a paper setting forth a methodology to develop sub-basin drought flow targets.

Option Ranking Homework Assignment

Matt McKinney explained the tables of options that Task Force staff had prepared and circulated to the members via either email or the US Postal Service. The tables include each option that the Task Force had previously included in drafts of chapters 2, 7, 8, and 9 of the management plan. To help focus the Task Force on these options, Mr. McKinney asked that prior to the next meeting, the Task Force rank each individual option as essential, ok, or unacceptable. A member

asked that another column be added to the tables so that one might indicate that the option is not understood well enough to rank. Staff will update the tables in light of today's Task Force actions and either email or mail them out by Wednesday, February 4. Task Force members agreed to fill out the tables and return them by February 17.

Discuss Water Management Plan Format and Content

Matt McKinney reviewed the Task Force budget and then discussed two options related to producing the water management plan. The status of the budget is summarized in the following table.

Amount	Task
\$120,000	Total budget amount
\$-62,900	Expenditure through December 2003
\$57,100	Remaining funds
\$-22,500	Process management
\$34,600	Unallocated
\$-16,000	Report preparation including writing (\$6,000), publishing and printing, and public meetings

Amount	Task
\$18,600	Unallocated
\$-7,900	Technical assistance (chapter 2)
\$10,700	Remaining for Task Force expenses and other

To complete the plan, Dr. McKinney suggested hiring a technical writer such as Sarah Vanderwetering, who in addition to being an excellent writer is also an attorney not presently practicing law and someone familiar with water issues. Finally, Dr. McKinney suggested hiring Dr. Larry Swanson, Associate Director for Regional Economics with the University of Montana's Center for the Rocky Mountain West first to brief the Task Force on the economic and demographic trends in the Clark Fork River Basin and then to prepare a chapter on this same topic for the water management plan.

Marc Spratt requested that the water management plan also contain an analysis of what water is worth. Mike McLane stated that an economist in the DNRC Water Management Bureau has been interested and has done some work related to this question. Dr. McKinney suggested that Mr. McLane ask the economist if he could do a literature search for and summarize existing analyses of this question.

Task Force Action - The Task Force agreed to Dr. McKinney's two suggestions, and requested that he make the appropriate arrangements with a technical writer and Dr. Swanson. The Task Force requested that Mr. McLane visit with the Water Management Bureau and ask if he could complete the literature review and summary of the worth of water for the water management plan.

State Water Plan Hearings

The Task Force agreed to request that the DNRC conduct six hearings on incorporating the water management plan into the State Water Plan, including one hearing in the upper and one in the lower Flathead basin, one in the upper Clark Fork basin, one in the Bitterroot basin, one in Missoula, and one in Thompson Falls. Staff will prepare press releases for each meeting, and Task Force members will hand deliver them to their local newspaper.

Next Meeting

The next meeting was scheduled for Monday, March 1, 2004 at 9:00 a.m. in the DFWP conference room at 3201 Spurgin Road in Missoula. The agenda will include:

- ☐ Discussion of a methodology to develop sub-basin drought flow targets.;
- ☐ Continued discussion of a hydropower water rights, junior water rights, and future water development; and
- ☐ Discussion of the compilation of Task Force member option prioritization.

Appendix 1 Water Banking

A Water Marketing Tool for Water Allocation

“A water bank is defined as a water conservation tool that enables voluntary, temporary transfers of water entitlements between willing water right holders and users based on how much water a user needs and when it is needed without a permanent change in water rights”.¹

A survey conducted by the state of Washington’s Department of Ecology (WDOE), reported that 9 of 18 surveyed western states have state-operated water banking activities in some stage of development. Apparently, the details of water banking vary greatly from state to state. WDOE reported that most states operate their bank at a regional level, which makes sense both hydrologically and culturally. “Regional banks require fewer resources and are likely to provide an opportunity to identify methods to meet local market requirements.”²

A brief examination of the water banking organizations, state banking provisions, and pilot programs established across the west indicate that banking mechanisms are being asked to do far more than “exchange” water entitlements. Additional services and operational controls are frequently added to reflect public policy.

A Market Facilitator

A water bank is first and foremost a facilitator of market exchanges. In 1991, and apparently in several subsequent years, the State of California developed a temporary water bank. California created a single governmental market that would buy water from all sources and sell water to all buyers. It also identified prices for purchase and sale. This structure greatly reduced transaction costs associated with water marketing.³ With the state’s water resources agency acting as the bank, contracts were developed in a single season with 351 sellers of water and 13 buyers. These contracts represented transactions for 830,000 acre-feet of water. Without the bank, the potential buyers, primarily municipalities and water district, would have had to seek out and develop contracts with many and potentially all of the 351 sellers. The state had unique responsibilities and knowledge and provided a critical link in the state’s many water delivery systems. The state, therefore, was also able to direct and restrict most potential water transaction to the bank itself, facilitate the delivery of water, and use its powers to require protection of environmental conditions.⁴

Other Water Bank Services

The Western States’ Water Council, in a report on state tools to provide water for endangered species, identified the following potential benefits of a market-based water bank:

A water banking...system, could potentially provide a centralized and specialized source of

¹ “Water Banking in the Walker River Basin” Barriers and Opportunities”, Fact sheet FS – O1-21, Loretta Singletary, Extension Educator, Lyon County, Cooperative Extension, University of Nevada

² “Water Banking Program in Other States”, Peggy Clifford, Washington Department of Ecology, April 21, 2003.

³ “The 1991 State of California Water Bank” Water Marking Takes a Quantum Leap, John B. Loomis, Dept of Agricultural Economic University of Davis, Rivers, Studies in the Science, Environmental Policy and Law of Instream Flow, Volume 2 number 2, April 1992.

⁴ Ibid.

information about water availability and water needs. A state of individuals having technical understanding of the hydrologic, economic, and legal impacts and economic externalities that accompany changes in water use, could be effective in negotiating cost-effective and resource efficient match-ups of buyers and sellers of water. The bank... may provide any or all of the following:

- a) A listing or registry of water rights for sale or lease, the location of those rights, the asking price, and the physical characteristics of the entitlement available to the public market.
- b) A registry of potential purchasers of water rights shares or lease-holds, the use intended, the quantity, quality, and regimen requirements, and the location of proposed use.
- c) Information about local water institutions, their supply availabilities, their service areas, storage and distribution facilities, and potentials for participation or involvement in accomplishing specific transfer options.
- d) Analysis of the “conditioning” implication and constraints in transferring a particular right from present use to new location and use situations.
- e) Clarification and possibly certification of legal status and title of water rights of interest to prospective buyers.

Though few states have used these techniques to change the use of large amounts of water, it is growing more popular in the West as demands increase.⁵

In many states the water bank serves primarily as the single market through which water sources buy and sell the rights to use water. Water banks often reduce transactions costs by developing a center / brokerage house that brings interested buyers and sellers together.⁶ In many instances, the bank becomes a repository for available water or water rights.

Most water banks have been created in over-appropriated areas as a tool to facilitate water conservation and water transfers. The Arizona Water Banking Authority appears to be the only bank created to encourage development and protection of unused water. The 1928 Colorado River Compact allocated water to lower basin states along the Colorado River. Arizona was allocated 2.8 million acre feet plus 46% of any annual surplus. Arizona was not utilizing this allocation. With creation of the banking authorities in 1996, Arizona developed a complex mechanism to divert water and store it during times of surplus and acquire credits during times of shortage. Each year the water bank pays the delivery and storage cost to bring Arizona’s share of unused Colorado River Water into Central and Southern Arizona through the Central Arizona project. The water is stored underground in existing aquifers (direct storage) or is used by irrigation districts in lieu of pumping ground water (indirect storage). Each acre foot stored the water bank accrues a credit that can be redeemed in the future when Arizona communities need this back-up supply. The Arizona water bank provides drought protection, enhanced water management, settlement of Indian water right claims, statewide water credits for Colorado water,⁷ and water for interstate water transfers.⁸ In 2002, using the water bank, Arizona diverted

⁵ “State Tools To provide Water For Endangered Species”, a report Compiled by Western State Water Council, Chad Shattuck, June 2003.

⁶ “Water Banking: What is it and How Does It Work?”, Loretta Singletary, Western Resource Issues Education Series, No. 6, Fact Sheet 98-90, University of Nevada, Reno. September 1992

⁷ Critics of the recharge and banking process are arguing that the current process maybe

its entire allocation of Colorado River Water for the first time. Further, the water bank recharged more than 345,00 acre feet of Central Arizona Project waters.⁹ A similar tool might not be of value to Montana in acquiring and using water from reservoirs such as Fort Peck, Hungry Horse, Yellowtail, and Koocanusa.

Water Marketing

While banking is currently being discussed and tried experimentally across the west, informal water markets continue to be used primarily to transfer of water from agricultural to urban uses. Recently, water markets have also been used to move water from consumptive to non-consumptive or in-stream environmental. These water market-facilitated movements have generated concerns related to water rights and the associated property rights and social, environmental and economic concerns. Many of these concerns are not traditionally reviewed in a water exchange. Examples of these concerns include:

- X Negative impact on local economies due to the transfer of water out of the area;
- X Potential decreases in food and animal feed supply (thus an increase in food and animal feed prices, at least locally);
- X Negative impacts on wildlife habitats hosted by crops or other irrigated plant life;
- X Loss of aesthetic associated with fallowed and now not cultivated lands
- X Weeds and other undesirable plant species introduction, also as the result of water retirements and no cultivation.
- X Decline of property values
- X Decline of local tax revenues.

Interestingly very similar community impacts have been attributed to the USDA's "Conservation Reserve Program" where farmers are paid not to cultivate crops.

To the extent that it facilitates similar transactions moving water from agricultural to urban uses and from consumptive to instream uses, water banking may generate similar concerns.

Third Party Effects

Third party effect is the legal team often used to identify the injury or undesirable impact to other parties or the hydrologic system when a water right or water use modification is implemented. In economic term these injuries are considered "negative externalities". Some argue that the third party or negative externalities can be addressed in markets by identifying and adding the externality cost to the cost of the commodity being traded.¹⁰

Traditionally in water law and water transactions the courts have decided the outcome and resolution of many of the third party effects related strictly to water use. Review of the current

failing in its attempts to bank ground water for future supply. Current statutory mechanisms allow credits in hydrologically unrelated basins and aquifers. This system may actually be promoting ground water drafting and mining while developing credits that cannot be met. "Recharge – Where's the Wet Water", Steve Weatherspoon, Guest View, Arizona Water Resource newsletter, September/October 2000, volume 9, Number 2, Arizona Water Center.

⁸ Arizona Water Banking Authority – Annual Report, 1997.

⁹ Arizona Water Banking Authority – Annual Report, 2002.

¹⁰ "Water Banking" A solution to Water Scarcity", Fact Sheet 98-10, Western Resource Issues Education Series No. 7, Loretta Singletary, Extension Educator, University of Nevada Reno, September 11992.

water banking and water marketing options developed by individual states indicate that public policy, not economics or the market, provide the protections from or mitigation for the third party effects.

Protection from and Mitigation of Impacts

Many states have incorporated regulatory processes governing water exchanges and functions of the water bank or water trust. For example, the State of Washington's Trust Water Rights Program authorities include the concepts of a) conversion of water to in-stream flow, b) salvage and c) marketing as functions of the Trust. Considerable emphasis is placed upon water conservation and enhancing supply by reducing demand and consumption. The Washington statute and rules specifically define "net water savings" and dedicate considerable effort in a process by which salvaged water is separated from return flows and expanded water use. Statutorily, the exercise of an acquired Trust right may not impair existing rights or the public interest. Provisions are also made for public notice prior receipt of a private water right by the Trust. Many states include this public notice as a safe guard. In Idaho, an application process is required either when water is moved into or rented from the water supply bank. Texas also uses an application process for deposits.¹¹

The Idaho Water Resources Board when examining a water right for banking must evaluate a number of items including whether:

- X Banking the right would cause injury to other water rights,
- X The proposal would constitute an enlargement of the water right;
- X The proposed use is a beneficial use;
- X There is sufficient water; and
- X The proposed uses would be in the local public interest.

Sale or rental of water through the Idaho water banking program is also restricted to the use within Idaho. Idaho also has overriding provisions governing sale of water rights¹² and changes to existing water rights.¹³ Idaho also has an appeals process whereby an existing water user that is being impacted by a lease to or from the water bank may petition the Idaho Water Resource director seeking revocation or modification of the lease.¹⁴

In the case of the Texas water bank, water deposits may not be made if the associated water right, or portion thereof, is not quantifiable, or when a petition or other formal action has been filed for cancellation or forfeiture of the water right before its deposit. A primary responsibility of the Texas water bank is the posting of water buyers and sellers. Within their banking system, Texas actually has two categories of water listed for market, those that have been affirmed by the Water Bank and those in which the bank only facilitates the meeting of the parties. In the latter case the banking transactions occur on a "buyer beware" basis.

Purchase/lease of Private Rights in Montana

Montana does have a water market in which water rights and water contracts are exchanged. With the passage of the Montana Water Use Act, we have developed administrative review

¹¹ 359.5 TAR, 2003

¹² 42-2601 – 2608 IC

¹³ 42-108 –108A IC

¹⁴ 42-1766 IC

processes intended to protect existing rights and mitigate third party effects that may result from certain modifications of water rights. Specific statutory recognition and review of water right exchanges are found in Title 85 of the Montana code and listed under the following statutory titles:

- X Temporary Changes in Appropriation Rights;¹⁵
- X Change in Appropriation Rights;¹⁶ and
- X Short-term Lease of Appropriation Right (This is a provision providing for short duration water supplies for road construction.).¹⁷

Statutes also contain three water lease programs used to augment or provide in-stream flow:

- \$ Temporary Change Authorization for Instream Flow;¹⁸
- \$ Water Leasing Study;¹⁹ and
- \$ Upper Clark Fork River Basin In-stream Flow Pilot Program”²⁰ (Also a previously mentioned a CFLP might rely upon purchased water to augment its water supply available to markets.)

These statutory provisions allow for the voluntary exchange of on a temporary or a permanent bases. The exchanges occur on a willing buyer-willing seller basis. State involvement is typically interjected only when the water right itself is “changed”, i.e. when the water right place of diversion, place of use, purpose of use, or place of storage is modified from the existing, historic operation. Statutory provisions and administrative processes also address abandonment, salvage, diversion requirements, system design and operation, and third party affects.

Montana does not have specific statutory water banking provisions. Most transactions apparently occur between private parties without brokers or representation. However, the two in-stream flow private leasing programs have stimulated the involvement of non-profit organizations who act as brokers. The newly formed Montana Water Trust and Trout Unlimited are functioning as lease holders for the conversion or leasing of existing private water rights to in-stream flow. They have joined the Montana Department of Fish, Wildlife and Parks as the lessor of in-stream flows.

Summary

The definition at the beginning of this paper defined a water bank is as a water conservation tool that enables voluntary, temporary transfers of water entitlements between willing water right holders and users based on how much water a user needs and when it is needed without a permanent change in water.” Several aspects of a water bank are currently provided for or are occurring in Montana. Existing statutes now provide methods to review and approve temporary and permanent transfers of water rights. The Department of Natural Resources and Conservation is authorized to protect the existing water right holder, mitigate third party effects, and implement state water development policy. The state plays a more limited role in sponsoring water conservation, water efficiency and water salvage. Water salvage is addressed within water

¹⁵ 85-2-407 MCA (2003)

¹⁶ 85-2-406 MCA (2003)

¹⁷ 85-2 410 MCA (2003)

¹⁸ 85-2-408 MCA (2003)

¹⁹ 85-2-431 MCA (2003)

²⁰ 85-2-439 MCA (2003)

rights. Water conservation and water use efficiency actions are directed to the state's water development loan and grant programs. Other common water bank functions such as facilitating water transactions, acting as a listing agent or broker are not currently provided for as a governmental function or as a recognized or regulated private sector service.

Appendix 2
Draft of 1/29/04
A Proposal:
A Clark Fork Water Leasing Program -
an alternative to Water Right Permitting

Leasing – Providing Water for New Uses

Montana water law is based upon the theory of “prior appropriation”, often summarized using the phrase, “first in time, first in right”. The state now makes new allocations of water by issuing water right permits which grant a permanent right to use water unless the conditions of its use change. A new right, however, is subject to prior appropriation which means that as the most junior right in a basin, it will be the first water use to be shut down in times of shortage. A junior water right in a basin is, therefore, the least secure.

Rather than issuing new water right permits, the state might choose a different approach. It might lease water for new uses. Such leases would have two important advantages. First, because lease allocations would not be permanent, the state could retain the option of reallocating water as Montanans’ need for and uses of water change. Second, to issue a lease, the state would have to obtain an assured supply of water. Leases would create more certainty both for the new user (the lessee) and for existing water users. A water right provides no assurance of water availability; instead it both allows the right holder to make call on other users with later priority dates and subjects the holder to calls by users with earlier priority dates. Leases could not affect water availability to existing water rights holders and would not increase their enforcement burden against new junior rights holders.

A Clark Fork Leasing Program

The leasing of water rights is not a new concept. Montana has multiple examples of such transactions, especially in recent decades. The Clark Fork Basin Leasing Program (CFLP) concept being proposed here, builds upon these other experiences, and may be operationally similar. However, in the CFLP the state would play a substantially different and much more active role.

This CFLP proposal recommends the creation of a state operated leasing system for the Clark Fork Basin as an alternative to the water right permitting process. New water developments in the basin would be developed not through a water right permit but through a water lease. The lease would be managed and brokered by the state as the proprietor. A lease would be for a defined period and would not become a private personal asset.

In its role as proprietor, the state would acquire water and water rights -- either as new water rights or through other mechanisms such as:

- ⊗ Leasing, purchasing, or reallocating stored water;
- ⊗ Using the state’s reservation of waters powers;
- ⊗ Constructing new storage;
- ⊗ Implementing water banking;
- ⊗ Purchasing existing rights; or
- ⊗ Where hydropower is limiting availability, purchasing a level of generation capacity.

The state may have a significant opportunity to make use of existing stored water in the Clark Fork Basin by acquiring blocks of water stored in the Hungry Horse Reservoir and, by

displacement, in Lake Koocanusa. To assure that the water leased would actually be “wet”, unappropriated, and available, the state would have to increase its water management and administrative activities such as forecasting and monitoring water supplies, monitoring water delivery, drought planning and mitigation, and water conservation.

Creating the CFLP: Statutory Changes

Montana already has a “Water Leasing Program”²¹ wherein the state, as proprietor, provides water to any beneficial use from either new appropriations or storage. This leasing program is managed under the directives of a statute titled “Right to Appropriate”²². The existing “Water Leasing Program” statute provides the operational and exclusive mechanism to provide water where a) water use would transport water outside the states river basins or b) when large amounts of water are to be consumed (4,000 acre feet per year and 5.5 cfs)²³. (A complete copy of this statute can be found in 85-2-141 MCA (2003) and is attached to this report.)

Implementing the CFLP would require statutory changes. One simple possibility would be to expand the conditions of the state’s existing leasing program so it also includes all appropriations in the Clark Fork of the Columbia basin. Language amendments in subsection two of the statute, “Right to Appropriate...” could expanded to include the Clark Fork basin those situations where leasing as the exclusive method of appropriation.²⁴

Existing Tools for Reallocation

It is also important to note that historically and currently Montanans do reallocate water and water rights. The buying selling, trading and exchanging of water rights has a long history. Since 1973, while such the exchanges between individuals remain a private action the modification of the associated water right is subject to administrative review. This review emphasizes protection of other existing water rights and mitigates third party impacts resulting from such exchanges.

The CFLP does **not** propose to change the status, value, or legal protections given to existing water rights or permits previously issued. The ability to change, lease, or temporarily lease existing water rights would not be altered in any way limited. In fact, the state might use these same provisions to create or expand the block of water used for leasing. Also, the CFLP need not be the single exclusive method of acquiring water for new developments. New

²¹ “Water Leasing Program”, 85-2-141, MCA (2003).

²² “Right to Appropriate – Recognition and confirmation of permits issued after July 1, 1972, 85-2-301 (2) MCA 2003.

²³ These statutory provisions were developed in 1985 as Montana’s response to a US Supreme Court case between Colorado and Nebraska. This case often referred to as the Sporhase v Nebraska, limited an individual state powers that might restrict the export of water.

²⁴ 85-2-301 (2) MCA (2003)

developments could also occur through voluntary exchanges of existing water rights as the law currently allows (specifically statutory provisions for “Changes in appropriation Rights” and “Temporary Changes in Appropriation Rights”)²⁵.

Advantages of Leasing

Under the CFLP,

- A more secure water supply for new developments could be provided;
- ⊘ Leased water could be reallocated to uses deemed critical over time;
- ⊘ Basic provisions of water law and the status of existing water rights would remain unchanged,
- ⊘ The efficiency of water management during times of shortage could be improved;
- ⊘ Public support and access to funds for water project infrastructures may be improved;
- ⊘ State involvement in water measurement and administration would increase, and
- ⊘ Leasing could be cost neutral because those needing new water supplies could fund the cost of obtaining and managing the leases.

Disincentives to Water Leasing

Leasing may also be faced with disadvantages:

- ⊘ Creation of a CFLP is likely to increase the immediate and short term costs of new water developments;
- ⊘ A leasing program backed by secure water will require more investment and management and will cost more than “hunting license” water permit system.
- ⊘ Under the CFLP, the state would be faced with the full responsibility of finding or assuring the availability of water for new uses -- water users’ risks are limited.
- ⊘ Because a leasing program would be new and unfamiliar, initially it may pose an increased hurdle to water development.

Summary

A CLFP would provide an alternative to allocating water through the issuance of new, junior water rights. Implementing such as program would require both a significant increase in the state’s involvement in water management and increased costs to the state to do so. The state’s costs could be offset by water users willingness to pay for an assured delivery of “wet” water as opposed to acquiring paper water rights with not delivery assurance. The CLFP may also provide a unique opportunity for Clark Fork basin water users to access water now stored in Hungry Horse Reservoir and Lake Koocanusa that is managed primarily for water users residing in downstream states. Relatively minor changes in statute would be needed to implement such a program specific to the Clark Fork Basin.

²⁵ “Changes in Appropriation Rights”, 85-2-402 MCA [2003] and “Temporary Changes in Appropriation Rights”, 85-2-407 MCA [2003].

Appendix 3

Assuring Water for Future Development: a Need for New Criteria?

The Task Force is to develop a water management plan that identifies options to protect the security of water rights and provide for the orderly development and conservation of water in the future. The Task Force may wish to examine and evaluate the existing criteria for the development of a new water right. It may also choose to recommend additional criteria for future development.

Perhaps the Task Force should ask if existing criteria adequately allocates what may be the “last” developable water in the basin? If not, should the basin have additional criteria governing new water developments? It is important to note that the State has already provided examples where additional criteria for permit authorization are acceptable.

Review of Existing Criteria:

In previous presentations, the Task Force has been introduced to statutes currently governing new water developments. The general rule is all new water developments, surface or ground water, must apply for and receive a water right permit before development. There are exemptions to this general rule.

The most prevalent exemption is that governing small well - wells that divert less than 35 gpm and less than 10 acre-feet per year. This exemption applies throughout the basin.²⁶ Such wells not subject to the permitting process. These wells are drilled, put to use, a notice of completion filed, and then a certificate of water right is automatically issued. Evaluation of such developments is minimal. Criteria for issuance are also not closely evaluated. However, it could be argued that developments that are wasteful or not a beneficial use under Montana Law can be denied or challenged later.

All application for a new water right permit must now meet the criteria of 85-2-311(1). Most are limited to section 1 criterion. However, certain classes of permits have additional requirements, which are discussed in the next section. Currently section 1 criteria can be simplified to include a showing with evidence that supports:

1. Physical availability of water at the proposed diversion,
2. Legal availability of water,
3. The Lack of adverse effect upon existing water rights,
4. Adequacy of means of diversion construction and operation,
5. A showing of beneficial use,
6. Possessor interest in place of use, and
7. Water quality considerations.

²⁶ There are several small “controlled ground water designation in the basin where this exemption no longer applies. These include the Houle Creek, Sharrot Creek, Hays Creek, MT Post and Pole Creek.

Examples of Additional Requirements

In 1985(?), the legislature, at the request of DNRC and response to ongoing competition for water both within and outside of the state, expanded the criteria for issuance of a new water right permit. These new sections 3 and 4 were added to the “Criteria for Issuance of a Permit”, (85-2-311 MCA [2003]). Both of these increased the informational requirements and burden of proof that certain new proposed water uses must meet before a water right permit is granted.

The legislature added to the applicant’s burden for certain large appropriations. In Section 3 of “Criteria for Issuance of a Permit”, a finding of reasonable use had to be made for certain large applications²⁷. This finding is based upon:

1. The benefits to the applicant and the state derived from the new use of water,
2. The effects on the quantity and quality of water for existing beneficial uses in the source of supply,
- N The availability and feasibility of using low-quality water or the purpose for which applicant has been made,
4. The effects on private property right by any creation of or contribution to saline seep, and
5. The probably significant adverse environmental impacts of the proposed use of water.

In section 4 of part 311, the legislature emphasized the importance of conserving Montana’s public waters and the necessity of maintaining adequate water supplies to meet water requirements. This section places additional permitting criteria for allowing water to be taken out of the state. These criteria are:

1. The proposed out-of-state use of water is not contrary to water conservation in Montana; and
2. The proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

To determine whether the applicant has proved these requirements the Department is to consider:

1. Whether there are present or projected water shortages within Montana
- N Whether the water that is the subject of the application could feasibly be transported to alleviate water shortage within the state of Montana
- N The supply and sources of water available to the applicant in the state where the water is to be used, and
- N Demands placed upon the applicant’s supply in the state where the applicant intends to use the water.

In the Upper Clark Fork Basin, that drainage area above Milltown Dam, additional criteria were created for all new groundwater developments. This additional requirement is found in 85-2-337. Any applicant for a new groundwater development in this sub basin must develop and submit a report addressing the hydrologic connection between surface and ground water. The applicant must show that the source of ground water is not part of or substantially or directly connected to surface water. The above listed criteria are tied to the development of the Upper Clark Fork Basin Closure (85-2-336 MCA [2003]) and were developed by the legislature at the request of

²⁷ This section provides additional criteria if the application is for greater than 5.5 cfs and more than 4000 acre-feet.

basin residents. The closure limits many new surface water diversions. It does not prohibit groundwater development. However, one of the concerns of basin water users was and is the interaction of ground and surface waters. So, while appropriation of ground water is NOT prohibited under the closure these additional requirements and finding of limited interaction that must be addresses at application.

Possible New Criteria:

The items listed below are not at this time recommendations but examples proposed as to stimulate dialog. The Task Force can evaluate these and other suggestions.

Groundwater: Ground water use and development is increasing. However, the state remains in a “catch-up” mode in terms of defining its water resources. Conceptually we know that ground water and surface water are hydrologically inter-related resources. Water law generally treats these as a single source and provides a unified system of appropriation. (However, Montana does still utilize the exemptions for small wells in 85-2-306 that implies and assumes a diminimus impact on the resource and interaction to other existing developments.) Considering these conditions, would the extension of the ground water reporting requirements found in 85-2-337 have value if used basin-wide?

Public Interest Criteria: Are the additional criteria for large applications, which have been referred to as “public interest criteria”, be of value as appropriations continue in the Clark Fork Basin. Should the applicant be required to define the following?

1. The benefits to the applicant and the state derived from the new use of water,
 2. The effects on the quantity and quality of water for existing beneficial uses in the source of supply,
 3. The availability and feasibility of using low-quality water or the purpose for which applicant has been made, and
 4. The probably significant adverse environmental impacts of the proposed use of water.
- Currently the test of beneficial use is limited to benefits derived by the appropriator. Public values are not addressed. Certain applications provide greater and wider spread public benefits than others. A recreational fish pond while it may provide benefits to the immediate landowner may not help the larger public fishery and may not provide much economic value to the larger community.

The same quantity of water used in a municipal system or for industry and manufacturing may be of higher priority. While the existing criterion in 311 does include water quality concerns they are only address if an objection occurs. Should all new applicants address water quality concerns up front or only upon objection?

The availability and feasibility of using low quality water may be of a lesser concern in western Montana where most waters are of high value. In eastern Montana, both surface supplies and groundwater supplies exist where salt contents frequently make water unusable without treatment. However, in the Clark Fork, proposed new water uses could be examined to determine if the treatment and use of low quality water would be economically feasible or it the

proposed use would not need high quality water. For example, since sewage effluent is appropriable water, should the reuse of this water first be prioritized? If industry needs water for a cooling tower should we ask them to evaluate and consider using a city's nearby waste water before it takes clean water out of the stream or ground water system?